

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NORTHEASTERN DIVISION

MAXWELL KREMER,

Plaintiff,

v.

REDDIT, INC.,

Defendant.

Case No. 2:21-cv-00038

Chief Judge Waverly D. Crenshaw, Jr.  
Magistrate Judge Alistair E. Newbern

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To: The Honorable Waverly D. Crenshaw, Jr., Chief District Judge

**REPORT AND RECOMMENDATION**

In this copyright and trademark action, pro se Plaintiff Maxwell Kremer alleges that Defendant Reddit, Inc., infringed his intellectual property rights when a photograph showing his business and its associated logo and business name was posted on Reddit's website. (Doc. No. 1-2.) Reddit has moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6), arguing that Kremer has failed to allege sufficient facts to support either a copyright or a trademark claim. (Doc. No. 8.) Kremer has filed a motion to strike Reddit's motion to dismiss (Doc. No. 14), which the Court has construed as Kremer's response in opposition to Reddit's motion. (Doc. No. 22.) Reddit has filed a reply. (Doc. No. 23.)

For the reasons set forth below, the Magistrate Judge will recommend that Reddit's motion to dismiss be granted. The Magistrate Judge will further recommend that the parties' other pending motions (Doc. Nos. 18, 19, 21, 24, 39, 43, 46) be found moot.

## **I. Factual Background<sup>1</sup>**

Maxwell Kremer is the sole owner and employee of Simcrimecom and owns Simcrimecom's business location in Cookeville, Tennessee.<sup>2</sup> (Doc. No. 1-2.) Kremer registered the Simcrimecom name as a trademark with the State of Tennessee on January 23, 2020, and registered the Simcrimecom logo with the United States Copyright Office on September 4, 2018.<sup>3</sup> (*Id.*) Reddit, a California business headquartered in Delaware, operates Reddit.com, a website it describes as "a network of user-driven online communities where . . . millions of people from around the world come together to read, share, discuss, and debate on the basis of shared interests." (Doc. No. 9, PageID# 41.)

On July 22, 2019, a photograph of Simcrimecom's business location (hereinafter, the Photograph) began to be displayed on Reddit.com. (Doc. No. 1-2.)

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<sup>1</sup> The facts as laid out here are pulled from the complaint and its attached exhibits (Doc. No. 1-2), and they are taken as true for the purpose of resolving Reddit's motion to dismiss. *See Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016).

<sup>2</sup> Kremer's complaint refers to his company in various places as either "Simcrimecom tm" or "Simcrimecom." (Doc. No. 1-2, PageID# 9–11, 14.) Kremer's exhibit showing his Tennessee trademark registration in the company name states the name of the mark is "Simcrime com," but also includes what appears to be a web address in a large font stating, "simcrime.com." (*Id.* at PageID# 14.) This Report and Recommendation will refer to Kremer's company as "Simcrimecom."

<sup>3</sup> The copyright certificate does not describe the logo's appearance beyond listing the title of the work as "Maxwell Kremer's image 1." (Doc. No. 1-2, PageID# 12.)

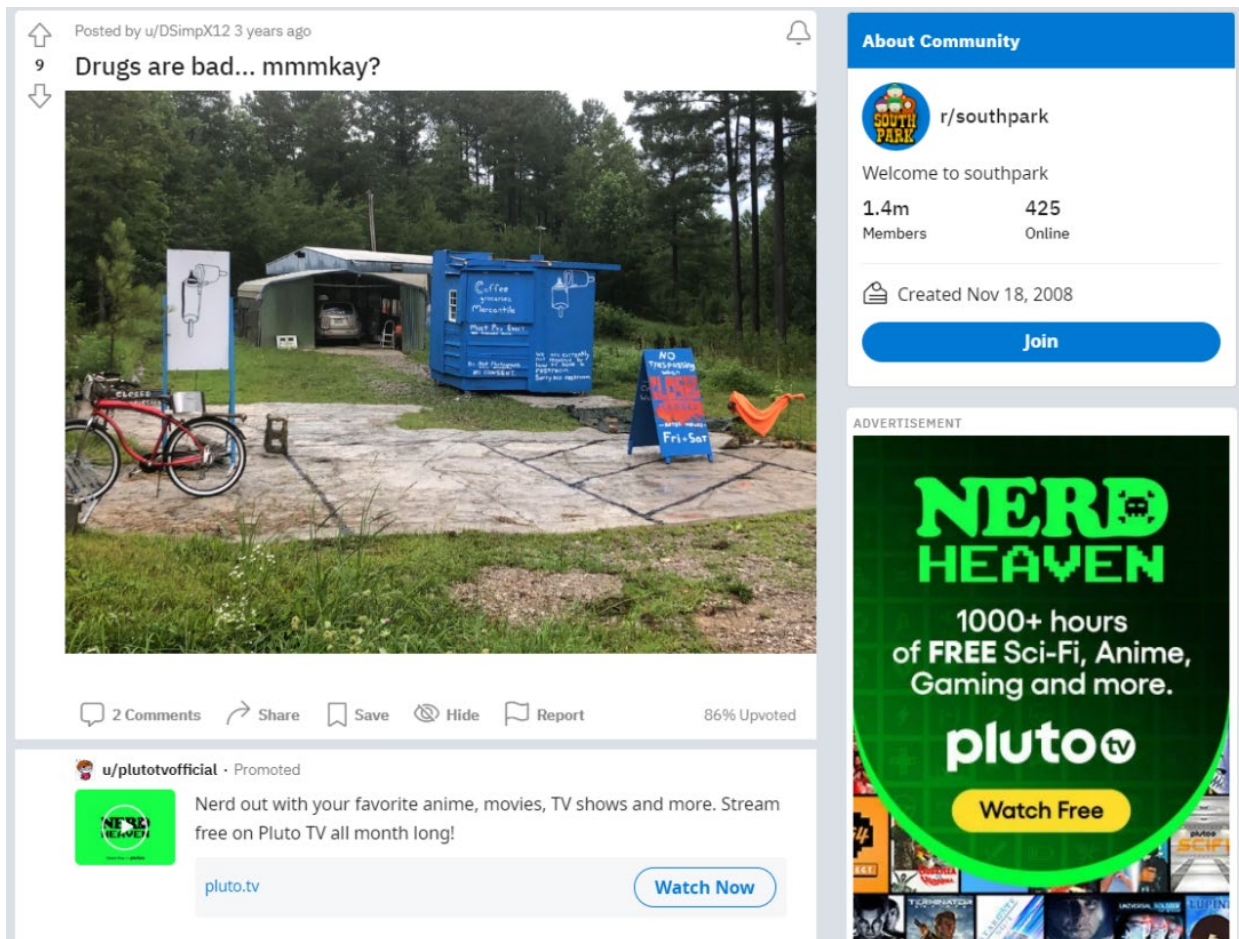


Figure 1 Screenshot of the Reddit.com page displaying the Photograph.<sup>4</sup>

The Photograph shows two small structures, one which appears to be a residence and the other a blue outbuilding with words painted on it reading: “Coffee groceries Mercantile”; “Must Pay Exact. NO CHANGE BACK.”; “We are currently not required by law to have a restroom. Sorry no restroom.”; and “Do Not Photograph this property. NO CONSENT.” (*Id.* at PageID# 13.)

<sup>4</sup> *Drugs Are Bad... Mmmkay*, Reddit: r/SouthPark, [https://www.reddit.com/r/southpark/comments/cgkgq9/drugs\\_are\\_bad\\_mmmkay/](https://www.reddit.com/r/southpark/comments/cgkgq9/drugs_are_bad_mmmkay/) (last visited Aug. 25, 2022).

The Court may consider the contents of the Reddit.com post found at the link Kremer provided in his complaint because the post is central to Kremer’s claims. *See Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008); *see also A.G. ex rel. N.G. v. Cmty. Ins. Co.*, 363 F.Supp.3d 834, 839 n.2 (S.D. Ohio 2019) (considering website at motion to dismiss stage because it was referred to in the complaint and central to the plaintiff’s claim) (citing *Bassett*, 528 F.3d at 430).

A blue sidewalk sign reads: “NO Trespassing when CLOSED. After hours Fri + Sat”. (*Id.*) A vehicle parked in the residence’s carport has “SimCrimeCom” spelled across its rear window. (*Id.*) To the left of the blue outbuilding is a white rectangular signpost bearing a black-and-white image. (Doc. No. 1-2.) The same image is painted in white on the blue outbuilding. (*Id.*) Advertisements appear below and to the right of the Photograph on the Reddit.com site.<sup>5</sup> (*Id.*)

Below the Photograph and advertisement is a comment attributed to “smokeout90.”



smokeout90 · 3 yr. ago

So we drove by and I said drugs are bad ...

Simcrimecom on the back of the vehicle with... read the rest of the stuff.. I've literally been driving by for months now and I finally had my brother take some pics..

Haha

Figure 2 The comment that appears below the Photograph on Reddit.com.

The comment reads:

So we drove by and I said drugs are bad[.]

Simcrimecom on the back of the vehicle with . . . read the rest of the stuff[.] I’ve literally been driving by for months now and I finally had my brother take some pics[.]

Haha[.]<sup>6</sup>

Kremer states that he learned the Photograph had been posted to Reddit.com on July 5, 2021. (Doc. No. 1-2.) Kremer filed a police report with the San Francisco Police Department,

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<sup>5</sup> The webpage contains advertisements both below and to the right of the Photograph. *Drugs Are Bad... Mmmkay*, Reddit: [r/SouthPark, https://www.reddit.com/r/southpark/comments/cgkgq9/drugs\\_are\\_bad\\_mmmkay/](https://www.reddit.com/r/southpark/comments/cgkgq9/drugs_are_bad_mmmkay/) (last visited Aug. 25, 2022). The content of the advertisements changes randomly.

<sup>6</sup> Smokeout90, Comment to *Drugs Are Bad... Mmmkay*, Reddit: [r/SouthPark](https://www.reddit.com/r/southpark/comments/cgkgq9/drugs_are_bad_mmmkay/) (July 22, 2019, 6:30 PM), [https://www.reddit.com/r/southpark/comments/cgkgq9/drugs\\_are\\_bad\\_mmmkay/](https://www.reddit.com/r/southpark/comments/cgkgq9/drugs_are_bad_mmmkay/).

asserting that Reddit had stolen his intellectual property by using the Photograph on its website.  
(*Id.*)

## **II. Procedural Background**

Kremer initiated this action on August 6, 2021, by filing a pro se complaint against Reddit in the Circuit Court of Putnam County, Tennessee, for felony copyright infringement and trademark infringement. (*Id.*) Reddit removed Kremer's suit to this Court on September 16, 2021. (Doc. No. 1.)

Kremer's complaint does not plainly state the legal bases for his claims, but he alleges generally that Reddit has infringed his Tennessee-registered trademark and committed felony copyright infringement in violation of 17 U.S.C. § 506(a) by displaying the Photograph and the Simcrimecom business name on its website and by using the Photograph and the name in advertisements. (Doc. No. 1-2.) Kremer states that Reddit's "agents, or accomplices[] photographed the [Simcrimecom] store location," and that Reddit then used the Photograph, including Kremer's copyrighted image, in "ad work on it[]s . . . website." (*Id.* at PageID# 10, ¶ 5.) Kremer describes his copyrighted image as "a rectangular white sign with black icon" (hereinafter, the Logo). (*Id.*) Kremer also alleges that Reddit has infringed on his "Simcrimecom" trademark (hereinafter, the Mark) by displaying it on Reddit.com, where Reddit "advertises it[]s own ability to offer management services, as ads and media advertising[.]" (*Id.* at ¶ 8.)

Kremer seeks one hundred million dollars in damages for copyright infringement, punitive damages, and injunctive relief requiring Reddit to cease its copyright and trademark infringement. (Doc. No. 1-2.)

Reddit filed a motion to dismiss this action under Rule 12(b)(6), arguing that Kremer has failed to include sufficient factual allegations to support a copyright or a trademark infringement claim. (Doc. Nos. 8, 9.) Reddit further argues that, even if the Court finds that Kremer has alleged

sufficient facts to support a copyright infringement claim, Reddit's use was both fair and de minimis as a matter of law. (Doc. No. 9.) Kremer counters in his response that he has stated a valid claim. (Doc. No. 14.) Although the arguments in his response are difficult to parse, Kremer asserts that Reddit used both the Logo and the Mark to further its advertising business. (*Id.*) Reddit filed a reply that reiterates the arguments made in its motion. (Doc. No. 23.)

### **III. Legal Standard**

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must “construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff.” *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016). Federal Rule of Civil Procedure 8(a)(2) requires only that a complaint contain “a short and plain statement of the claim[.]” Fed. R. Civ. P. 8(a)(2). However, “[t]he factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead ‘sufficient factual matter’ to render the legal claim plausible, i.e., more than merely possible.” *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A plaintiff must plead more than “‘labels and conclusions[.]’” “‘a formulaic recitation of the elements of a cause of action[.]’” or “‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (third alteration in original) (quoting *Twombly*, 550 U.S. at 555, 557). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

Because Kremer appears pro se, the Court construes his filings “liberally” and holds his complaint “to less stringent standards than formal pleadings drafted by lawyers[.]” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). There are limits to liberal construction, however, and “courts are not required to conjure up unpleaded allegations or guess at the nature of an argument.” *Brown v. Cracker Barrel Rest.*, 22 F. App’x 577, 578 (6th Cir. 2001) (citing *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989)).

#### **IV. Analysis**

The Court liberally construes Kremer’s complaint to allege a claim for copyright infringement under the federal Copyright Act and a claim for trademark infringement under the Tennessee Trademark Act of 2000. Because Kremer has not pleaded sufficient factual allegations to state a plausible claim under either statute, Kremer’s complaint must be dismissed.

##### **A. Copyright Claims**

Before evaluating Kremer’s allegations, this Court must address Reddit’s suggestion that copyright infringement claims require a heightened pleading standard than other civil actions. (Doc. No. 9.) Reddit cites *National Business Development Services, Inc. v. American Credit Education & Consulting Inc.*, 299 F. App’x 509, 512 (6th Cir. 2008), to support its position that a court should dismiss copyright infringement claims at the pleading stage if the plaintiff does not plead the case with particularity. (Doc. No. 9, PageID# 44–45.) But “a careful reading”—and historical contextualization—of *National Business Development* belies the claim that copyright infringement claims are subject to a special pleading standard in this Circuit.” *Gen. Motors LLC v. Dorman Prods., Inc.*, No. 15-12917, 2016 WL 5661578, at \*3 (E.D. Mich. Sept. 30, 2016). In that case, the court affirmed the lower court’s dismissal of the plaintiff’s copyright claim on grounds that the plaintiff had articulated “no more than a speculative claim that Defendants may have produced some work that in some way infringed upon Plaintiff’s works.” *Nat’l Bus. Dev.*,



299 F. App'x at 512 (quoting No. 07-11140, 2007 WL 2318752, at \*3 (E.D. Mich. Aug. 8, 2007)). In doing so, the court noted that the Supreme Court had “recently clarified the pleading standards required by the Federal Rules of Civil Procedure” in *Bell Atlantic Co. v. Twombly*, 550 U.S. 544 (2007), and held that they “‘require[ ] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’” *Id.* (quoting *Twombly*, 550 U.S. at 555.) The plaintiff corporation, however, asked the Sixth Circuit to apply the “more liberal” pleading standard that had also recently been articulated in *Erickson v. Pardus*, 551 U.S. 89 (2007), for complaints filed by pro se litigants. *Nat’l Bus. Dev.*, 299 F. App'x at 512.

The Sixth Circuit distinguished *Twombly* and *Erickson*, noting that pro se pleadings “must be held to less stringent standards than formal pleadings drafted by lawyers[,]” while *Twombly* “concerned an anti-trust matter, where the case emphasized the heightened possibility for abuse among lawsuits of this specie.” *Id.* The court found that “[c]opyright infringement, like anti-trust actions, lends itself readily to abusive litigation,” and that “greater particularity in pleading, through showing ‘plausible grounds,’ is required.” *Id.* The court found that *Twombly*—and not a pleading standard created for copyright infringement claims—provided that appropriate pleading standard. *Id.* The Sixth Circuit has uniformly applied *Twombly* to copyright infringement claims since its decision, and the Court will do so here. *See, e.g., Severe Recs., LLC v. Rich*, 658 F.3d 571, 578 (6th Cir. 2011) (applying the *Twombly* and *Iqbal* standard to a copyright infringement claim); *Wright v. Penguin Random House*, 783 F. App'x 578, 581, 573 (6th Cir. 2019) (same); *Martinez v. McGraw*, No. 10-5594, 2011 WL 13394623, at \*1 (6th Cir. Aug. 23, 2011) (same).

### **1. Criminal Copyright Infringement**

Kremer’s complaint alleges felony copyright infringement against Reddit under 17 U.S.C. § 506(a). (Doc. No. 1-2.) Kremer asserts that Reddit should be held criminally liable for its acts because Reddit “victimized” Kremer and was “harmful to [his] business, Simcrimecom[.]” (Doc.



No. 1-2, PageID# 10, ¶ 9.) Reddit did not address Kremer’s felony copyright infringement claim in its motion to dismiss, disregarding Kremer’s allegations about his police report as “unrelated to the claims[.]” (Doc. No. 9, PageID# 42, n.2.)

Kremer cites the statute that establishes a criminal copyright infringement charge, but that statute does not provide a private right of action that Kremer could pursue. *Pugh v. Norman*, No. 3:16-cv-02075, 2017 WL 712751, at \*8 (M.D. Tenn. Feb. 23, 2017), *report & recommendation adopted*, No. 16-02075, 2018 WL 731807 (M.D. Tenn. Feb. 6, 2018) (“[T]here is no private right of action to pursue a claim of criminal copyright infringement under 17 U.S.C. § 506 . . . .”); 17 U.S.C. § 506(a). Kremer’s felony copyright infringement claim must be dismissed for failing to state a claim upon which relief can be granted. *See Pugh*, 2017 WL 712751, at \*8; Fed. R. Civ. P. 12(b)(6).

Kremer also asks the Court to award him one hundred million dollars in damages for Reddit’s alleged copyright infringement. (Doc. No. 1-2.) Construing Kremer’s pro se complaint liberally, *see Erickson*, 551 U.S. at 94, the Court will also consider Kremer’s allegations in the context of a civil a civil copyright infringement claim under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

## **2. Civil Copyright Infringement**

The purpose of the Copyright Act is “to encourage the production of original literary, artistic, and musical expression for the public good.” *Ronald Mayotte & Assocs. v. MGC Bldg. Co.*, 149 F.3d 1184 (table), 1998 WL 385905, at \*3 (6th Cir. July 1, 1998) (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524, 534 (1994)). To achieve that purpose, the Copyright Act provides protection for “original works of authorship[.]” including “pictorial, graphic, and sculptural works[.]” 17 U.S.C. § 102(a)(5). A copyright holder has several “exclusive rights” under the Copyright Act, most relevantly including the rights to reproduce and distribute copyrighted works.

17 U.S.C. § 106(1), (3). The Copyright Act provides a private right of action for copyright owners against “[a]nyone who violates any of the exclusive rights of the copyright owner[.]” 17 U.S.C. § 501(a). An individual can be liable for direct or secondary copyright infringement. *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005). Direct copyright infringement holds the individual who infringes liable, while secondary copyright infringement is “the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984).

Kremer does not specify whether he claims that Reddit committed direct or secondary copyright infringement. (Doc. No. 1-2.) Reddit has addressed both types of liability in its motion to dismiss. (Doc. No. 9.)

#### **a. Direct Copyright Infringement**

Direct copyright infringement is established by showing that (1) the plaintiff has a valid copyright in the work at issue and (2) the defendant copied protected elements of that work. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). “The first prong tests the originality and non-functionality of the work, both of which are presumptively established by the copyright registration. The second prong tests whether any copying occurred (a factual matter) and whether the portions of the work copied were entitled to copyright protection (a legal matter).” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 534 (6th Cir. 2004) (citation omitted).

Reddit argues that Kremer has failed to establish either prong of direct copyright infringement because Kremer has not (1) identified the work that Reddit copied and (2) alleged any conduct on Reddit’s part in copying the protected elements of Kremer’s work. (Doc. No. 9.) Reddit alternatively argues that, if the Court finds Kremer has successfully pleaded direct

infringement, Reddit’s use is both fair and de minimis as a matter of law. (*Id.*) Kremer responds that he identified the copyrighted work by attaching his copyright registration to the complaint. (Doc. No. 14.) Reddit replies that “[m]erely attaching a copyright registration certificate, without more, does not meet [his] burden.” (Doc. No. 23, PageID# 128.)

Registration with the Copyright Office is both a prerequisite for bringing a copyright infringement claim and prima facie evidence that a plaintiff owns a valid copyright in the work at issue. *Lexmark*, 387 F.3d 533–34; *see also Moses v. YouTube, Inc.*, No. 12–2822, 2013 WL 12095139, at \*6 (W.D. Tenn. Sept. 23, 2013), *report and recommendation adopted*, 2014 WL 549205 (W.D. Tenn. Feb. 11, 2014) (finding that copyright registration creates a rebuttable presumption that a plaintiff owns a copyright in his work). “Indeed, it is sufficient at the pleading stage for a plaintiff to allege, without more, that the claimant has registered a copyright in the relevant work.” *Phoenix Ent. Partners, LLC v. Gulfcoast Spirits, LLC*, No. 3:17-CV-967, 2019 WL 8161158, at \*4 (N.D. Fla. Jan. 2, 2019). Kremer has alleged that he registered a copyright in his artwork and attached a copy of his copyright registration for “Maxwell Kremer’s image 1” as an exhibit to his complaint. (Doc. No. 1-2, PageID# 12.) Kremer therefore has fulfilled his burden under this standard.

Reddit argues that Kremer has not identified the work that he claims Reddit copied because “[the Photograph] includes multiple different drawings . . . and the copyright registration does not itself identify the registered work except to say that it is an ‘image.’” (Doc. No. 9, PageID# 46, 47.) Kremer refers to the copyrighted image in the complaint as “a rectangular white sign with black icon” (Doc. No. 1-2, PageID# 10, ¶ 5), and the Photograph contains only one rectangular white sign that shows a black image (Doc. No. 1-2, PageID# 13). Taking the alleged facts as true and drawing all reasonable inferences in Kremer’s favor, *see Courtright*, 839 F.3d at 518, the Court

finds that Kremer has alleged that the black icon represented on the white sign and depicted in the Photograph—the Logo—is the image that Kremer registered with the Copyright Office.



Figure 3 The “rectangular sign with black icon” referred to herein as the Logo.<sup>7</sup>

Kremer has satisfied the first prong of the direct copyright infringement test by alleging facts that show he has a valid copyright in the Logo. *See Lexmark*, 387 F.3d 533–34.

Once a plaintiff establishes that he possesses a valid copyright, he must next plead sufficient factual allegations to establish that the defendant copied protected elements of that work. *Feist*, 499 U.S. at 361. “Not all ‘copying’ is actionable, however: it is a constitutional requirement that a plaintiff bringing an infringement claim must prove ‘copying of constituent elements of the work that are original.’” *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir. 2003) (citing *Feist*, 499 U.S. at 361). Kremer has failed to meet this burden.

Reddit cites *Moses v. YouTube, Inc.*, 2013 WL 12095139, at \*6–7, to support its position that Kremer has not adequately alleged that Reddit copied the Logo. (Doc. No. 9.) The plaintiff in *Moses* sued video-hosting website YouTube for copyright infringement after a YouTube user

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<sup>7</sup> *Drugs Are Bad... Mmmkay*, Reddit: r/SouthPark, [https://www.reddit.com/r/southpark/comments/cgkgq9/drugs\\_are\\_bad\\_mmmkay/](https://www.reddit.com/r/southpark/comments/cgkgq9/drugs_are_bad_mmmkay/) (last visited Aug. 25, 2022); (Doc. No. 1-2, PageID# 13).

posted a video titled “Pimp Pretty” that the plaintiff alleged unlawfully used her copyrighted sound recording “Pimpin Pretty.” 2013 WL 12095139, at \*1–2. The plaintiff alleged that YouTube “authoriz[ed] and deriv[ed] profit from the distribution of [the] ‘Pimp Pretty’ video.” *Id.* at \*1. The court found the plaintiff had not state a plausible claim for direct copyright infringement because she failed to plead facts that would show that YouTube had copied any protected elements of her work. *Id.* at \*7. Specifically, the court found that the plaintiff’s allegation that YouTube “‘publicly displayed these infringing acts, derivatives, and elements of [her] original works’ merely states a legal conclusion[.]” *Id.*

Kremer similarly fails to allege with particularity how Reddit copied the protected elements his Logo. (Doc. No. 1-2); *see Moses*, 2013 WL 12095139, at \*6–7. Kremer alleges that

[t]he defendant, Reddit.com, began to display the copyright and trademark on it[]s business website without permission, on July 22, 2019. One of the defendant Reddit.com’s agents, or accomplices, photographed the Simcrimecom tm store location, depicting the brand copyright logo and painted signage that reads “Do not photograph this property. No consent.” The defendant Reddit.com began using the illegal photograph in ad work on it[]s business website.

(Doc. No. 1-2, PageID# 10, ¶ 5.) As in *Moses*, Kremer’s allegations do not plausibly allege facts from which the Court can find that YouTube directly infringed on his copyrighted work. *See* 2013 WL 12095139, at \*6–7.

First, although Kremer alleges that it was Reddit’s “agents, or accomplices” who took the Photograph, he alleges no facts to support that legal conclusion. Without allegations to demonstrate an agency relationship between Reddit and the photographer this is “a mere conclusory allegation of agency” that is insufficient to withstand a motion to dismiss. *Midkiff v. Adams Cnty. Reg’l Water Dist.*, 409 F.3d 758, 767 (6th Cir. 2005) (finding similar conclusory allegation of agency relationship “insufficient as a matter of law” and therefore futile in context of a motion to amend

the complaint).<sup>8</sup> Thus, Kremer’s copyright infringement claim boils down to an allegation that an unknown person took the Photograph and Reddit “used” the Photograph on its website. (Doc. No. 1-2).

“Courts widely recognize that direct infringement requires ‘volitional conduct’ by the alleged infringer.” *Average Joe’s Ent. Grp., LLC v. SoundCloud, Ltd.*, No. 3:16-CV-3294, 2018 WL 6582829, at \*2 (M.D. Tenn. Oct. 17, 2018) (noting that, “[c]onsistent with the national trend, the Sixth Circuit has recognized that direct infringement occurs where a defendant intentionally and knowingly copies a copyrighted work” (citing *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 802 (6th Cir. 2005)); see also *Perfect10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017) (“[D]irect infringement requires the plaintiff to show causation (also referred to as ‘volitional conduct’) by the defendant.”); *Smith v. BarnesandNoble.com, LLC*, 143 F. Supp. 3d 115, 121 (S.D.N.Y. 2015) (requiring the plaintiff show “volitional conduct” by the defendant to establish direct copyright infringement relating to the unauthorized reproduction of the plaintiff’s book by the defendant). Kremer alleges that Reddit “us[ed]” his copyrighted image without any accompanying facts to establish what actions Reddit took that would constitute use. (Doc. No. 1-2, PageID# 10, ¶ 5.) Without such allegations, Kremer’s complaint states only a legal conclusion. See *Hill v. Waters*, No. 2:17-cv-532, 2018 WL 11356706, at \*5 (S.D. Ohio Feb. 2, 2018) (finding plaintiff’s assertion the defendants “‘copied all of his copyrights,” to be “nothing but a legal conclusion” because plaintiff failed to “specify which protected elements of his works were infringed or” how the defendants’ actions “constitute[d] impermissible copying of those protected elements[.]”). Kremer’s inclusion of a screenshot of the Reddit.com website does not remedy this

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<sup>8</sup> An “accomplice” is “[s]omeone who is in any way involved with another in the commission of a crime[.]” *Accomplice*, Black’s Law Dictionary (11th ed. 2019). That term does not have a relevant meaning in the context of Kremer’s civil copyright claim.

shortcoming. *See Williams v. 3DExport*, No. 19-12240, 2020 WL 532418, at \*4 (E.D. Mich. Feb. 3, 2020) (finding that pro se plaintiff's inclusion of links to websites associated with defendants without providing allegations regarding that content did not satisfy notice pleading requirements when alleging copyright infringement). The screenshot shows that the Photograph appeared on Reddit.com; it does not contribute any plausible allegations that Reddit copied Kremer's protected work. Kremer has not alleged sufficient conduct on the part of Reddit to support a direct copyright infringement claim.

**b. Secondary Copyright Infringement.**

A plaintiff may assert secondary copyright infringement claims in addition to direct copyright infringement. *Grokster*, 545 U.S. at 930. Secondary copyright claims arise when a defendant indirectly infringes upon another's work either contributorily or vicariously. *Id.* "One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Id.* As a precursor to establishing either contributory or vicarious copyright infringement, a plaintiff must first successfully plead direct copyright infringement. *See Gordon v. Nextel Commc'ns*, 345 F.3d 922, 926 (6th Cir. 2003) ("[T]here can be no secondary liability absent primary infringement."). Because Kremer has not shown that any direct copyright infringement occurred, he cannot successfully plead an indirect copyright infringement claim.

Because this Court recommends Kremer's copyright infringement claims be dismissed for failure to state a claim, it need not address Reddit's assertion of fair use and de minimis use affirmative defenses.

**B. Trademark Claim**

Kremer also alleges trademark infringement claims against Reddit for its use of the Mark. (Doc. No. 1-2.) Kremer has stated in his complaint and several other filings that he seeks to recover



for trademark infringement under Tennessee law based on his Tennessee-registered trademark. (Doc. Nos. 1-2, 6, 10, 14.) The Court will construe Kremer’s complaint as requesting relief under only § 47-25-512 of the Tennessee Trademark Act of 2000 (Trademark Act). Tenn. Code Ann. § 47-25-512.

The Trademark Act defines a trademark as “any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the goods of such person . . . from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown[.]” *Id.* § 47-25-501(10). The Trademark Act provides that registered trademark owners may bring a civil action against others who infringe on their trademark in various ways, including by:

[using], without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a mark registered under this part in connection with the sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, mistake or deception as to the source of origin of such goods or services[.]

*Id.* § 47-25-512(1). The Trademark Act is intended to create a state registration framework and trademark protection that is “substantially consistent with the” Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, which provides federal trademark protection. Tenn. Code Ann. § 47-25-518. The Trademark Act stipulates that cases interpreting the Lanham Act are persuasive authority for use in interpreting the Trademark Act. *Id.* As such, courts have applied the Lanham Act standards when evaluating Trademark Act claims. *See Kebab Gyros, Inc. v. Riyad*, No. 3:09–0061, 2009 WL 5170194, at \*5 (M.D. Tenn. Dec. 17, 2009) (applying the Lanham Act’s “likelihood of confusion” analysis and eight-factor test to a trademark infringement claim under the Trademark Act); *Wildside, LLC v. MDW, Inc.*, No. 3:03-1084, 2007 WL 9782794, at \*1 (M.D. Tenn. Jan. 10, 2007) (referencing Tenn. Code Ann. § 47-25-518 and determining that the court’s Lanham Act

evaluation standards should guide its analysis of plaintiff's request for attorney's fees under the Trademark Act).

Kremer included his Tennessee trademark registration as an exhibit to the complaint (Doc. No. 1-2), and Reddit does not challenge that he owns the Mark.

### **1. Use in Commerce**

The Trademark Act prohibits use of a mark without consent “in connection with the sale, distribution, offering for sale, or advertising of any goods or services . . . .” Tenn. Code Ann. § 47-25-512(1). The analogous provision in the Lanham Act addresses a mark's “use in commerce.” 15 U.S.C. § 1125(a)(1). Under the Lanham Act, a mark can “be deemed to be in use in commerce” as either “on goods” or “on services.” *Id.* § 1127. The Trademark Act's definition of “use” is nearly identical to the Lanham Act's definition. *Compare* Tenn. Code Ann. § 47-25-501(11) *with* 15 U.S.C. § 1127. Kremer alleges that Reddit used the Mark in advertising, and the Court thus reviews his claim as one for nonconsensual use of the Mark in connection with services.

A mark is “deemed to be in use in commerce . . . [o]n services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce . . . .” 15 U.S.C. § 1127. Regardless of the defendant's intentions, “even ‘minimal’” advertising can create liability when supported by the use of another's trademark. *Audi AG v. D'Amato*, 469 F.3d 534, 546 (6th Cir. 2006) (quoting *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6th Cir. 2003)). However, a plaintiff must allege facts that plausibly allege *how* the defendant “used or displayed [the mark] in the sale or advertising of services” “in the ordinary course of trade” to state a claim for trademark infringement. 15 U.S.C. § 1127; *compare Glob. Licensing, Inc. v. Namefind LLC*, No. 21-cv-11101, 2022 WL 274104, at \*10–11 (E.D. Mich. Jan. 28, 2022) (finding the plaintiff sufficiently pleaded use in commerce by alleging the defendant used plaintiff's trademark “on the front page of its pay-per-click website and provided links to confusingly similar products and services.”),

*with Plateau Cas. Ins. Co. v. Securranty, Inc.*, No. 2:22-cv-00007, 2022 WL 2205263, at \*4 (M.D. Tenn. June 21, 2022) (explaining that plaintiffs’ allegations “that the statements made by [defendant] ‘were used in commercial advertisement or promotion,’ and ‘deceive third parties in a material way,’” were insufficient to state a false advertising claim under the Lanham Act).

Kremer’s allegations regarding Reddit’s use of the Mark are entirely comprised of his statements that “[t]he webpage displays dialogue text that reads ‘Simcrimecom[.]’ and ‘Reddit.com advertises it[]s own ability to offer management services, as ads and media advertising, and therefore infringes on Simcrimecom by displaying the wordmark without permission.” (Doc. No. 1-2, PageID# 10, ¶¶ 5, 8.) Unlike the plaintiff’s allegations in *Global Licensing*, which described how the defendant used its trademark to make money from pay-per-click advertising, Kremer does not provide any allegations to show how Reddit used the Mark in commerce. (Doc. No. 1-2); *cf Global Licensing*, 2022 WL 274104, at \*10. Pleading that Reddit used the Mark and that Reddit also sells advertisements is insufficient to constitute “use in commerce” because Kremer’s allegations do not link Reddit’s alleged use of the Mark to its advertising. *See Plateau Cas. Ins. Co.*, 2022 WL 2205263, at \*4. Kremer has not adequately alleged that Reddit used his Mark in commerce.

## **2. Likelihood of Confusion**

In evaluating trademark infringement claims, courts place special emphasis on whether a defendant’s use of a mark is “‘likely to cause confusion among consumers regarding the origin of the goods [or services] offered by the parties.’” *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 610 (6th Cir. 2009) (quoting *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir.1997)). Because Kremer has not plausibly alleged that Reddit used the Mark in commerce, he cannot allege use that is likely to cause confusion. The Court need go no further in its analysis.

**V. Recommendation**

For the foregoing reasons, the Magistrate Judge RECOMMENDS that Reddit's motion to dismiss (Doc. No. 8) be GRANTED and Kremer's complaint (Doc. No. 1-2) be DISMISSED. The Magistrate Judge further RECOMMENDS that Kremer's motions to compel discovery (Doc. Nos. 18, 19), motions for summary judgment (Doc. Nos. 24, 39), motion for injunctive relief (Doc. No. 43), and motion to include more evidence for injunctive relief (Doc. No. 46); and Reddit's motion for status conference (Doc. No. 21) be FOUND MOOT.

Any party has fourteen days after being served with this Report and Recommendation to file specific written objections. Failure to file specific objections within fourteen days of receipt of this report and recommendation can constitute a waiver of appeal of the matters decided. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004). A party who opposes any objections that are filed may file a response within fourteen days after being served with the objections. Fed. R. Civ. P. 72(b)(2).

Entered this 26th day of August, 2022.

  
ALISTAIRE. NEWBERN  
United States Magistrate Judge